



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Kimmins Thermal Corporation

File: B-238646.3

Date: September 12, 1990

Thomas Richelo, Esq., Peterson Dillard Young Self & Asselin,
for the protester.

C. Stanley Dees, Esq., and Charlotte D. Young, Esq.,
McKenna, Conner & Cuneo, for Weston Services, Inc., an
interested party.

Craig R. Schmauder, Esq., Department of the Army, for the
Agency.

Catherine M. Evans, Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest alleging organizational conflict of interest on the
part of awardee is dismissed as untimely filed where
protester was informed of agency's decision to reverse its
position and consider awardee's proposal, but did not file
protest until after award, more than 1 month later.

DECISION

Kimmins Thermal Corporation protests the award of a contract
to Weston Services, Inc., under request for proposals (RFP)
No. DACA41-90-R-0004, issued by the Army Corps of Engineers
for construction of a transportable incineration system for
explosives-contaminated soils. Kimmins claims that award to
Weston was improper because of an alleged organizational
conflict of interest.

We dismiss the protest as untimely.

The RFP was issued on January 3, 1990. On February 2 and
February 9, prior to receipt of initial proposals, the Corps
sent notices to Weston stating that it was ineligible for
award because its parent company, Roy F. Weston, Inc., had
held three previous contracts involving design-related work
on the incineration system, creating an organizational
conflict of interest and affording Weston an unfair
competitive advantage. The February 2 notice cited Federal
Acquisition Regulation (FAR) § 36.209, which reads:

049419 / 142200

"No contract for the construction of a project shall be awarded to the firm that designed the project or its subsidiaries or affiliates except with the approval of the head of the agency or authorized representative."

Notwithstanding the notices, Weston submitted a proposal on February 16, the closing date for initial proposals. The contracting officer notified Weston on February 22 that its proposal would not be evaluated, and Weston filed a protest of this decision in our Office. The contracting officer subsequently determined that it would be in the best interest of the government to evaluate Weston's proposal, and Weston accordingly withdrew its protest on April 12.^{1/}

During the week of May 21, in the course of a telephone conversation with a contracting specialist, Kimmins was advised that the agency had decided to consider Weston's proposal. Following discussions and two rounds of best and final offers, the agency determined that Weston's proposal was most advantageous to the government, and requested a waiver of FAR § 36.209. The waiver was granted on June 22, and the contract was awarded to Weston on June 27. Kimmins then filed this protest on July 6.

Our Bid Protest Regulations require that protests be filed not later than 10 days after the basis for protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1990). A protester is charged with knowledge of the basis of protest at the point where agency personnel convey to the protester the agency's intent to follow a course of action adverse to the protester's interests. MIDDCO, Inc.--Recon., B-235587.2, Oct. 31, 1989, 89-2 CPD ¶ 402. Here, Kimmins learned of the agency's intent to pursue a course of action contrary to its interests when the contracting specialist informed Kimmins that the agency had decided to consider Weston's proposal for award. In advising Kimmins of its intent to consider Weston's proposal, the Corps implicitly was giving notice that if Weston ultimately was found entitled to the award based on the RFP's evaluation criteria, Weston would receive the award. This clearly constituted notice of the agency's intent to follow a course of action contrary to Kimmins' interests. Thus, to be timely under our Regulations, Kimmins' protest would have to have been filed within 10 working days after May 25 (i.e.,

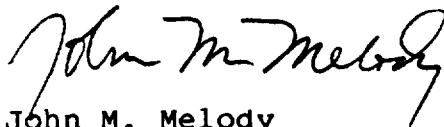
^{1/} While Kimmins was informed of Weston's protest, it declined the opportunity to comment on the protest because it "had no reason to suspect the agency would reverse itself."

the last day of the week of May 21). Kimmins did not do so, and its protest therefore is untimely..

Kimmins asserts that its basis of protest did not arise until it learned of the award to Weston. While Kimmins concedes that it learned during the week of May 21 of the agency's decision to consider Weston's proposal, Kimmins contends that this decision did not amount to a determination that Weston was eligible for award, and that Weston remained ineligible for award until the agency obtained the waiver of FAR § 36.209. Kimmins argues that, since it did not know that the agency had determined Weston eligible for award until it learned of the award, the basis for protest did not arise until that time. We disagree.

An agency's acceptance of a proposal for evaluation does not itself amount to a determination that the offeror is eligible for award of the contract. See John J. McMullen Assocs., Inc., B-188703, Oct. 5, 1977, 77-2 CPD ¶ 270. Therefore, in applying our timeliness rules, we will not charge a protester with knowledge that another firm was considered eligible for award simply because the protester knew that the other firm had submitted an offer. Id.; VAST, Inc., B-182844, Jan. 31, 1975, 75-1 CPD ¶ 71. Here, however, Kimmins knew that the agency had decided to consider for award an offer that it had previously found ineligible. Indeed, Kimmins cites in support of its protest the agency's "fail[ure] to adhere to its position that Weston was ineligible for the contract," a failure of which Kimmins was aware during the week of May 21. The fact that Kimmins may have believed Weston was not yet eligible for award did not negate the firm's knowledge that the Corps intended to take a course of action that could result in an award to Weston.

The protest is dismissed.



John M. Melody
Assistant General Counsel